Maersk Kenya Limited v Multiplan Packaging Limited (Civil Appeal E181 of 2022) [2024] KEHC 8462 (KLR) (Civ) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E181 OF 2022

DKN MAGARE, J

JULY 8, 2024

BETWEEN

MAERSK KENYA LIMITED .... APPELLANT

AND

MULTIPLAN PACKAGING LIMITED .... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. H. M. Ng'ang'a (PM) in Nairobi CMCC No. 8770 of 2021, delivered on 25th October, 2022)

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. H. M. Ng'ang'a, PM given on 25/10/2022 in Nairobi CMCC 8770 of 2021. The Appellant was the Defendant and an Applicant in the court below.
2. The ruling related to application dated 3/10/2022 and 14/10/2022 by the Respondent and 19/10/2022 by Appellant. The last one was an application to strike out suit.
3. The court is said to have dismissed the application to strike out and allowed the third application. The said application was that the Kenyan Courts had jurisdiction. The Appellant argued that the Kenya courts have no jurisdiction. The case related to an agreement that the jurisdiction to hear the case was based upon the English High Court in London vide clause 26 of Terms of Carriage.
4. From the short ruling the Appellant filed a humongous Memorandum of Appeal on the following grounds:-
    a. The learned magistrate erred in law in arrogating jurisdiction to himself in a matter over which Kenyan Courts lack the requisite jurisdiction to adjudicate by virtue of the express terms of the contract between the parties.

b. The learned magistrate erred in law and in fact in misconstruing the meaning of the term "carriage" under the contract between the parties, which term is clearly defined therein and by virtue of such misconstruction, proceeded to make an erroneous finding that the shipping agreement had been discharged, yet a reading of the terms of the contract between the parties indicates that the contract applies to any and all other services whatsoever undertaken by the Carrier (the principal of the Appellant) in relation to the goods.

c. The learned magistrate erred in law and fact in making a finding that there was no dispute relating to the loading, unloading and handling of the goods or an services undertaken by the carrier, yet the release of the goods to the consignee is part and parcel of the contract between the parties, hence the Appellant's exercise of its right of lien over the goods.

d. The learned magistrate erred in law and fact in making a finding that the carriage of the goods is a contract between the Appellant and the shipping agent, and that the Respondent is only a consignee hence not a party to the said contract, yet the explicit terms of the contract between the parties indicates that a consignee is a party to the contract.

e. The learned magistrate erred in law by relying on an authority, being *4MB Mining Limited v Misnak International (UK) Limited and 2 others* [2021] eKLR which the parties were not given an opportunity to submit on and were thus denied a fair hearing and proceeded to compound the error by misconstruing the meaning and import of the said authority.

f. The learned magistrate erred in law and fact in finding that the shipping company (Maersk Line AS) is not a party to the dispute, yet the Appellant was sued as an agent of the said shipping company (a disclosed principle), which is the party that entered into the shipping agreement with the plaintiff's principal, hence ignoring the principles applying to the law of agency.

g. The learned magistrate erred in law and fact in finding that the cause of action before him was materially different from the main contract in the Bill of Lading, then going on to find that the contract was performed in Kenya after the discharge of the goods at the port of entry/discharge, which are contradictory findings as the contract between the parties cannot be inapplicable and applicable at the same time.

h. The learned magistrate erred in law and fact in using his erroneous finding that the cause of action is materially different from the main contract in the Bill of Lading as the basis for his finding that the respondent had established a strong reason for Kenya Courts to assume jurisdiction over the dispute between the parties.

i. The learned magistrate erred in law and in fact and effectively rewrote the contract between the parties by failing to consider clause 10 of the Terms for Carriage (which forms part of the contract between the parties), which indicates that the Terms of Carriage, including clause 26 on jurisdiction, would apply to any loss or damage whatsoever whether founded in contract, bailment or tort.

j. The learned magistrate erred in law and in fact by departing from a binding precedent of the High Court, being *Pyrotechnics Company Limited v Maersk Kenya Limited* [2021] eKLR, which is substantially on all fours with the dispute between the parties herein, yet no reason were given for departing from the said binding precedent and the dispute between the parties herein is not an exceptional case.

k. The learned magistrate erred in law and in fact by determining the dispute between the parties at the interlocutory stage by making a finding that the contract, which constitutes the Bill of

Lading and Terms for Carriage, is inapplicable to the circumstances of the case, leaving nothing to be heard during the hearing of the main suit save for determining the damages to be paid by the Appellant.

l. The learned magistrate erred in law and in fact and effectively extinguished the Appellant's right of lien, contrary to the express terms of the contract that provide that the said right of lien applies whether the contractual carriage is completed or not and that the right of lien survives delivery of the goods.

m. The learned magistrate erred in law and in fact in disallowing an application that was essentially unopposed as neither a Replying Affidavit nor Grounds of Opposition had been filed in response to the application by the Respondent, hence the averments in the application stood uncontroverted and unchallenged rendering any findings contrary thereto erroneous.

n. The learned magistrate misapprehended both the facts and the applicable law in the matter, disregarded the submissions and relevant authorities that were presented before him, and arrived at a decision that was contrary to the law.

o. In the circumstances, the learned magistrate failed to do justice as regards the matter that was before him and accordingly erred in law by arriving at the decision that he did, and which ultimately resulted in a gross miscarriage of justice.

5. There is no appeal on other aspects of the ruling including the two applications by the respondent.

Analysis

6. The grounds are argumentative, prolixious, unseemly and an eye sore. No such grounds should be entertained. The appeal is a regurgitation of one ground, that is; whether the Kenya Courts have jurisdiction.

7. A Memorandum of Appeal should be concise in terms of Order 42 Rule 1, which provides as hereunder: -

> "1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

8. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is *pari materia* with Order 42 Rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the

rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 others* [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J) dated 19th September 2018 raise only two issues..."

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. The matter proceeded by way of affidavits and documentary evidence. The court thus has a wider latitude. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the *Court of Appeal Rules 2010*; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to

take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

13. The documents are interpreted the same way both by this court and the court below. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed…"

14. The background alone is enough. I am alive that the dispute is alive before the court below. The nature of the dispute relates to a contract that is to be performed in Kenya. The subject matter is in Kenya and was indeed released vide an order issued by the same court on 13/12/2021. The clause indicating that such a minor dispute is to be heard in London is unconstitutional and against Public Policy. The parties are both Kenyan companies.

15. In *4MB Mining Limited v Misnak International (UK) Limited and 2 others* [2021] eKLR, Njoki Mwangi J stated as follows:-

> " 102. This Court has held that central in the suit filed herein will be the interpretation and applicability of some of the provisions of the *EACCMA*. The preamble of the said Act states that it is an Act of the Community to make provisions for the management and administration of Customs and for related matters. The Community means the East African Community, of which Kenya is a Party to. In the said circumstances, Kenyan Courts are inclined not to cede jurisdiction to Courts in England in an instance where it is properly seized of jurisdiction to interpret and apply *EACCMA*. It is also noted that the substance of Common law will also come into play.
>
> 103. Having gone through the amended plaint, it is claimed that the cause of action arose in Mombasa within the jurisdiction of this Court. The 1st applicant did not file a defence to claim that the cause of action arose outside the jurisdiction of the Kenyan Courts and that the applicable law is the law in England, thus Kenyan Courts have no jurisdiction to hear the case filed by the respondent.
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> 104. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) KLR 898 Madan JA stated as follows:
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> > "The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties freely fixed the forums for the settlement of their disputes; the court should carry out the intention of parties and enforce the agreement made by them in accordance with the principle that a contractual

undertaking should be honoured unless there is a strong reason for not keeping them bound by the agreement." (emphasis added).

105. I agree with Ms Okumu's submissions that the 2nd segment of the contract between the 1st applicant and the respondent was a distinct one as the respondent's cargo was to be loaded on trucks sourced to transport the goods from Mombasa enroute to Juba, South Sudan. Mombasa was the transit Port where the goods in issue had to be offloaded and stored before being transported by road to Juba. On the instructions of the 1st applicant, the goods were trans-shipped to Dubai by the 2nd applicant when the respondent failed to pay bond in transit fees pegged on CIF as requested by the 1st applicant. The claim by the 1st applicant that the respondent had in all previous occasions."

16. The application was on the basis that the shipper was an agent of the Respondent and the Appellant was an agent of Maersk Egypt A/S who are in turn agents of another company. There is no agreement between the parties herein. However, both are company incorporated in the Republic of Kenya. The alleged breach occurred in Nairobi long after the ship had sailed. The purpose of registering local agents in Kenya is to sue them.

17. Whereas the parties are said to be agents of other agents, the contract between those parties ousting jurisdiction is not binding on this court. The main reason the principals did not sue was because the subject matter is meagre. There is no basis for two Kenyan companies to sue each other in London.

18. A long list of authorities by this court have settled that a dispute between Kenyan Companies over breach in this country will be heard in this country. It is a public policy issue that was dealt with by the Supreme Court of Canada Sitting in Ontario in the case of *Uber Technologies Inc. v Heller*, 2020 SCC 16 (CanLII), [2020] 2 SCR 118, where the court stated as doth: -

> " In addition to the two exceptions to arbitral referral in Dell and Seidel, a court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in Dell is that if the court does not decide an issue, then the arbitrator will. Dell did not contemplate a scenario wherein the matter would never be resolved if the stay were granted. Such a situation raises obvious practical problems of access to justice that the Ontario legislature could not have intended when giving courts the power to refuse a stay. One way in which the validity of an arbitration agreement may not be determined is when an arbitration agreement is fundamentally too costly or otherwise inaccessible. This could occur because the fees to begin arbitration are significant relative to the plaintiff's claim or because the plaintiff cannot reasonably reach the physical location of the arbitration. another example might be a foreign choice of law clause that circumvents mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law. In such situations, staying the action in favour of arbitration would be tantamount to denying relief for all claims made under the agreement. The arbitration agreement would, in effect, be insulated from meaningful challenge.
>
> Accordingly, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. To determine whether only a court can resolve the challenge to arbitral jurisdiction, the court must first determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge

may never be resolved by the arbitrator. While this second question requires some limited assessment of the evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. If there is a real prospect that referring a challenge to an arbitrator's jurisdiction to the arbitrator would result in the challenge never being resolved, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record. The Court, therefore, should resolve the arguments H has raised."

19. The value of the goods is barely Kshs 20,000,000/=. These are so small in the international trade that no sane court can order the matter be heard in London. Even the decision relied on by the Appellant vindicates the court below. The court never stated that it is never prepared to relieve parties. It is that in special cases it can do so. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):
>
> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

20. The court is not prepared to refer to London matters that are related to breach of contract in Kenya long after shipping has been concluded. This is more so when the expenses will outstrip the costs. The Court of Appeal in case of *DT Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR, laid the principles applicable in considering whether or not to strike out pleadings as follows:-

> " The Court should not strike out suit if there is a cause of action with some chance of success:
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> "The power to strike out suit should only be used in plain and obvious cases and with extreme caution;
>
> The power should only be used in cases which are clear and beyond all doubt;
>
> Court should not engage in a minute and protracted examination of documents and facts; and
>
> If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward."

21. The court has to be careful when driving a party out of the seat of justice. More poignantly a party challenging territorial jurisdiction must not take any step in the proceedings. The Appellant entered appearance and filed several affidavits in the case. This included the application for release of goods. Ipso facto, they acceded to jurisdiction. Their right to challenge jurisdiction at the earliest possible time meant that they lost the right to subsequently do so.

22. In the case of *Areva T & D India Limited v Priority Electrical Engineers & another* [2012] eKLR, the court of Appeal [Bosire, Visram, & Koome, JJA] stated as follows: -

> " I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge's conclusion that his Court "would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification" is based on no evidence that we can discern from the record, and the Judge's order that the arbitration be conducted by "a single arbitrator to determine the dispute between them within fourteen (14) days of today's date failure of which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute" is without jurisdiction."

23. In this matter, there was no agreement between the parties. It is between other parties, where the respondent is not party. The court is not bound to have third parties bound by agreements between those parties. An agreement, even if for the benefit of third parties cannot bind nonparties. I cannot see the signature of the Respondent on the agreement. The extrapolation does not help to oust jurisdiction.

24. In *Marine Cargo Claims* Third Edition, by William Tetley, at page 187 the learned author states as follows regarding the person who may sue in a contract of carriage by sea;-

> " Under the terms of the contact of sale, the buyer may become vested with title to the goods before or upon shipment. The seller may nevertheless have acted as shipper in contracting with the carrier. The buyer with whom title has already vested, may be the consignee on the bill. Such a consignee, who cannot benefit from the Bills of Lading Act, should nevertheless be able to maintain an action in his own name against the carrier for loss of or damage to goods due to the latter's failure to exercise proper care".

25. The application related to release of cargo from the inland container terminal in Nairobi. The cargo had already been discharged in Nairobi. None of the parties herein were party to the original shipping agreement. The Appellant was an agent of Maersk Egypt.

26. In *Universal Pharmacy (K) Limited v Pacific International Lines (PTE) Limited & another* [2015] eKLR, Justice Kasango stated as follows: -

> " Another important reason why the application must fail is because the Defendants entered unconditional appearance. This court dealt with the issue of jurisdiction where the Defendant entered an unconditional appearance in the case of *Petra Development Services Limited v Evergreen Marine (singapore) Pte Ltd & another* [2014] eKLR. This court stated as follows:
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> > "The summons in this case required Defendants to enter an appearance within 15 days. The appearance was due on or before 12th June 2014. Defendants filed an Appearance on 20th June 2014. That Appearance was in the following terms-
> >
> > "Memorandum Of Appearance

> Please enter appearance for Evergreen Marine (singapore) Pte Limited And Gulf Badar Group (kenya) Limited, the Defendants herein whose physical address for service is S.K.A. House, Dedan Kimathi Avenue, and whose postal address is P.O. Box 83156-80100, Mombasa.
>
> Dated At Mombasa this 20th day of June, 2014.
>
> Anjarwalla & Khanna
>
> Advocates For The Defendants."

As it will be seen that was an unconditional Appearance. The Court of Appeal in the case *Kanti & Co. Limited* (supra) held that once such an Appearance is filed a party has then submitted itself to the jurisdiction of the Court. *Black's Law Dictionary* defines Appearance as-

> "A Defendant's act of taking part in a Law suit, whether formally participating in it or by answering, demurrer, or motion ..."

In that definition the dictionary in attempting to give further explanation of Appearance stated –

> "... appearance, which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the Court."

It therefore follows that as at 20th June 2014 Defendants submit themselves to the authority of this Court. That means the Defendants as at that date submit to this Court to have authority over the Plaintiff's claim for the release of Bills of Lading and for damages incurred. It is important to remember that the Jurisdiction Clause reproduced above provided the carrier who is the Defendants had the option to unilaterally waive the jurisdiction of England. For our remembrance of the Clause it stated-

> "This Law and Jurisdiction Clause is intended solely for the Carrier's (Defendants) benefit and may be unilaterally waived by the carrier, in whole or in part before or after proceedings are commenced."

It follows that by filing an unconditional Memorandum of Appearance on 20th June 2014 the Carrier (the Defendants) waived that jurisdiction of England and wholly submitted to this jurisdiction."

27. In this matter the Appellant not only entered unconditional appearance but also filed various affidavits and submissions. The record of appeal has concessions that some application was compromised. With that the jurisdiction clause was overtaken.

28. The case related to an agreement that the jurisdiction to hear the case was based upon the English High Court in London vide clause 26 of Terms of Carriage. The court is said to have dismissed the application to strike out and allow the third application. The said application was that the Kenyan Courts had jurisdiction. The Appellant argued that the Kenya courts have no jurisdiction.

29. I shall dismiss the 5th ground in limine. The lower court or even this court is not bound by submission of parties. The court can use any authority under the sun. The court is bound by precedent and cannot ignore binding precedent. The decision of *4MB Mining Limited v Misnak International (UK)*

Limited and 2 others [2021] eKLR, is binding on that court whether the court was alerted by the parties or not.

30. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [*supra*] Madan JA stated as follows:

> "The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties freely fixed the forums for the settlement of their disputes; the court should carry out the intention of parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping them bound by the agreement."

31. The idea of having clauses ousting jurisdiction of this country are against Public Policy. Unless there is a clear link with London, there can be no basis for referral of a matter of this nature to London and the parties before the court. There is no nexus between the parties and the contract that relates to shipping. It is between different parties.

32. Recently, the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, stated as doth: -

> "alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

33. In the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR, quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, posited that:

> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

34. In the case of *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR, Justice R.E. Aburili, stated as doth: -

> "65. In *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR, the Court of Appeal deliberated on the doctrine of privity of contract at length and in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (supra) the Court rendered itself that:
>
> > "In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus: "My Lords, in the

law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.""

> 66. The doctrine of Privity of Contract is a long established part of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party."

35. The Appellant was invoking a contract between other parties to oust jurisdiction. It is irrelevant that they are agents of agents. That relates to agency agreements between them. The suit herein relates to companies that have not entered into a jurisdiction ousting contract.

36. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

37. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> "With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

38. Had parties contracted to arbitration, it could be a different ball game. The shipping line and agents are required to be sued in this country. This is only to add that the proper court to deal with the dispute is Mombasa High Court. I shall consequently transfer Nairobi CMCC 8770 of 2021 to Mombasa High Court for hearing and determination.

Determination

39. The upshot of the foregoing is that I make the following orders:-

    a. The Appeal herein lacks merit. It is accordingly dismissed with costs of Kshs 385,000/= to the Respondent.

    b. The file is closed.

DELIVERED, SIGNED AND DATED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of:-

Mutua for the Appellant

Mwachoti for the Respondent

Court Assistant - Jedidah